EMPLOYMENT TRIBUNALS

Claimants: Dr Marcus Bicknell (C1)
The British Medical Association (C2)

(a) **Respondent:** NHS Nottingham and Nottinghamshire Integrated Commissioning Board

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 11, 12, 13, 14 and 21 July 2022

Before: Employment Judge M Brewer
Mr C Williams
Mr K Rose

Representation

Claimants: Ms N Motraghi, Counsel
Respondent: Mr D Bayne, Counsel

JUDGMENT

It is the unanimous judgment of the Tribunal in relation to the claims by Dr Bicknell that:

1. The claim for automatic unfair dismissal fails and is dismissed.
2. The claim for dismissal contrary to Regulation 7(2) of TUPE fails and is dismissed.
3. The claim for 'ordinary' unfair dismissal succeeds.
4. The claim for breach of contract fails and is dismissed.

It is the unanimous judgment of the Tribunal in relation to the claim by the British Medical Association for breach of Regulation 13 (2) and 13(6) TUPE that the claim fails and is dismissed.

REASONS

Introduction

1. These claims were heard over five days. Day one was a reading day and we heard evidence and submissions over the next four days.

2. The claims were originally brought against NHS Nottingham City Clinical Commissioning Group and NHS Nottingham and Nottinghamshire Clinical Commissioning Group. However, by the time of the final hearing neither of those organisations existed.

3. NHS Nottingham City Clinical Commissioning Group ceased to exist on 31 March 2019 when it merged with other clinical commissioning groups in the Nottinghamshire area to form what was originally the second respondent, NHS Nottingham and Nottinghamshire Clinical Commissioning Group. In turn, the original second respondent has now been replaced by NHS Nottingham and Nottinghamshire Integrated Care Board.

4. In this judgement we shall use the following nomenclature:

    a. NC CCG for NHS Nottingham City Clinical Commissioning Group
    b. NN CCG for NHS Nottingham and Nottinghamshire Clinical Commissioning Group and
    c. NN ICB for NHS Nottingham and Nottinghamshire Integrated Care Board.

5. One issue that arose at the outset of the hearing and which we discussed with the parties was the extent to which NN ICB could have liability for things done by either of the original two respondents. We recognised that if there had been a relevant transfer from NC CCG to NN CCG and then again from NN CCG to NN ICB liability may track through because of the operation of TUPE. However, having had a reading day and looking at the agreed list of issues, it was not one of the matters for us to determine whether there was a TUPE transfer from NN CCG to NN ICB and without evidence on the matter it was difficult to see how we could determine that the current respondent was potentially liable and therefore whether they should in fact be a respondent at all.

6. Mr Bayne reasoned that if the tribunal found that there had been a TUPE transfer between NC CCG and NN CCG he would be in considerable difficulty arguing that there was not a TUPE transfer to the current respondent, NN ICB. It also followed of course that if we found that there was no TUPE transfer from NC CCG then the current respondent would have no liability in any event.

7. Having thus discussed the matter, it seems to us that the conclusions can be summarised as follows: the respondent's case was that there was no TUPE transfer from NC CCG to NN CCG and likewise no TUPE transfer from NN CCG to NN ICB, but if the tribunal determines that there was a TUPE transfer from NC CCG to NN CCG, the respondent would not argue that that was no

TUPE transfer from NN CCG to it. It was on that basis that Ms Motraghi on behalf of the claimants agreed that there was no need for the tribunal to determine the issue of whether there was a TUPE transfer from NN CCG to NN ICB and we have not done so.

8. We had written witness statements and heard oral evidence from Dr Bicknell, Ms Shazia Karim on behalf of the British Medical Association (BMA), and for the respondent, from Ms Sarah Carter who, at the relevant time, was Executive Director - Transition Operations, HR and Organisational Development, Dr John Porter who, at the relevant time, was Clinical Chair of NC CCG, Dr Stephen Shortt who, at the relevant time was Clinical Chair of Rushcliffe CCG and Mr Stephen Wright who was and remains Head of Human Resources Business Partners for NHS Arden and Greater East Midlands Commissioning Support Unit.

9. The tribunal had a bundle of documents which with additional documents added during the course of the hearing ran to over 1500 pages.

10. As well as the above the tribunal have also taken account of the careful and detailed submissions of both Counsel and we wish to express our thanks to them for their assistance during the course of the hearing in navigating what are complex issues.

Issues

11. The parties agreed a list of issues which we have attached as an appendix to this judgement. We simply note here that the claims being pursued by Dr Bicknell are:

    a. automatic unfair dismissal (Regulation 7(1), Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE))
    b. unfair dismissal (Regulation 7(2), TUPE)
    c. unfair dismissal (section 98, Employment Rights Act 1996 (ERA))
    d. breach of contract (Article 3, Employment Tribunals Extension of Jurisdiction Order 1994).

12. The BMA brings a claim for failure to inform and/or consult under Regulation 13 of TUPE.

Law

TUPE – relevant transfer

13. Regulation 3 TUPE defines relevant transfer as follows:

> ***"3 A relevant transfer***
>
> *(1) These Regulations apply to –*

> *(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity; …*
>
> *(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. …*
>
> *(4) Subject to paragraph (1), these Regulations apply to –*
>
> *(a) public and private undertakings engaged in economic activities whether or not they are operating for gain; …"*

14. However, Regulation 3(5) TUPE contains an exception to the above definition in the following terms:

> *"(5) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer"*

15. Regulation 3(5) TUPE gives effect to the decision of the Court of Justice in **Henke v Gemeinde Schierke and Another** (Case C-298/94) [1996] ECR I-4989; [1997] ICR 746. Thus, this is sometimes referred to as the **Henke** exception.

16. More generally, Regulations 3(1)(a), 3(4)(a) and 3(5) of TUPE give effect to Article 1 of Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (the Acquired Rights Directive (ARD)).

17. Article 1(1) ARD provides:

    a. *This Directive shall apply to any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer of merger*

    b. *Subject to paragraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary*

    c. *This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of the Directive.*

TUPE – automatic unfair dismissal (Regulation 7(1))

18. Regulation 7(1) TUPE provides as follows:

> *"Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer"*

19. A dismissal will be automatically unfair if the sole or principal reason for the dismissal is the transfer itself. The Tribunal's determination of the reason for dismissal is a question of fact.

TUPE – unfair dismissal (Regulation 7(2) and 7(3)) and 'ordinary' unfair dismissal

20. Regulations 7(2) and (3) TUPE provide as follows:

> *"(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organizational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer*
>
> *(3) Where paragraph (2) applies*
>
> *(a) paragraph (1) shall not apply;*
>
> *(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held"*

21. In short, if the reason for dismissal is not the transfer itself, but is for a reason which is an economic, technical or organisational reason entailing changes in the workforce (a so-called ETO reason), then first, that reason will be either redundancy or some other substantial reason and, second, the dismissal will not be automatically unfair and the fairness of the dismissal will be judged in accordance with the law of unfair dismissal as that applies under s.98 Employment Rights Act 1996 (ERA).

22. Under s.98 ERA it is for the respondent to show what was the reason for dismissal.

TUPE – Information and consultation

23. The relevant information and consultation duties are set out in Regulation 13 TUPE as follows:

"(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

> *(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;*
>
> *(b) the legal, economic and social implications of the transfer for any affected employees;*
>
> *(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and*
>
> *(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact…*

(2A) [details of agency workers]

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures

(7) In the course of those consultations the employer shall—

> (a) consider any representations made by the appropriate representatives; and
>
> (b) reply to those representations and, if he rejects any of those representations, state his reasons…

15.—(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;

c) in the case of failure relating to representatives of a trade union, by the trade union; and

(d) in any other case, by any of his employees who are affected employees…

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11)…"

Breach of contract

24. The tribunal's jurisdiction is set out in the 1994 Order at Article 3 as follows:

"Extension of jurisdiction

3. Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and(c) the claim arises or is outstanding on the termination of the employee's employment"

25. We refer to relevant case law in the conclusions section below.

Findings of fact

26. We make the following findings of fact (references are to page numbers in the bundle unless otherwise indicated).

27. In order properly to understand the context in which these claims arise it is necessary to rehearse some of the history of structural changes within the NHS.

28. In April 1999 481 primary care groups were established in England. Primary and community health services were brought together in a single Primary Care Group controlling a unified budget for delivering health care to and improving the health of communities of about 100,000 people. A PCG was legally speaking a subcommittee of a District Health Authority.

29. As part of the implementation of the NHS Plan 2000, PCGs were transformed into primary care trusts (PCT) and 17 PCTs were established in April 2000, a further 23 in October 2000, and 124 in April 2001 with a plan that all primary care groups would become PCTs by 2004.

30. PCTs provided funding for GPs and medical prescriptions; they also commissioned hospital and mental health services from NHS provider trusts or from the private sector. PCTs were managed by a team of executive directors headed by a Chief Executive. These directors were members of the PCT Board together with a number of non-executive directors appointed after open advertisement. The Chair of each trust was a non-executive director. Other board members included the chair of the trust's professional executive committee (PEC) (elected from local general practitioners, community nurses, dentists, pharmacists etc.).

31. In 2005 the government announced that the number of Strategic Health Authorities and PCTs would be reduced, the latter by about 50 per cent. The result was that, as of 1 October 2006, there were 152 PCTs (reduced from 303) in England, with an average population of just under 330,000 per PCT. After these changes, about 70 per cent of PCTs were coterminous with local authorities having social service responsibilities, which facilitated joint planning.

32. The provision of primary healthcare services was gradually removed from PCTs under the Transforming Community Services initiative and on 12 July 2010, the Government unveiled a new health White Paper which eventually became law as the Health and Social Care Act 2012. Among the changes under the 2012 Act PCTs were to be abolished by 2013 and be replaced by new GP-led commissioning consortia, called clinical commissioning groups (CCG). The

public health aspects of PCTs became the responsibility of local councils and Strategic Health Authorities were abolished.

33. Most PCT staff were transferred to CCGs, those involved in public health transferred to local authorities and some support staff were transferred into newly created commissioning support units (CSU).

34. Very shortly after CCGs commenced operation it became apparent that many of them were too small to be as effective as they might be in commissioning health services and therefore a number began to operate as one organisation at a functional level whilst at the same time each one remained a separate and distinct statutory NHS body.

35. In Nottinghamshire there were originally seven CCGs – NC CCG, Mansfield & Ashfield CCG, Newark & Sherwood CCG, Nottingham North & East CCG, Nottingham West CCG, Rushcliffe CCG and Bassetlaw CCG.

36. From 2017 Nottingham North & East CCG, Nottingham West CCG, Rushcliffe and NC CCG began working together as the Greater Nottingham Partnership [1102]**.** On 4 April 2018 they began working together under a joint committee.

37. By April 2018 Mansfield & Ashfield CCG and Newark & Sherwood CCG were operating as one functional organisation and known as "Mid-Nottinghamshire".

38. On 1 July 2019 the six of the seven Nottinghamshire CCGs (all but Bassetlaw CCG) began acting in concert and created for that purpose a so-called committee in common.

39. By 2019 a five-year vision for primary care was created which involves the migration to integrated care systems (now embodied in the respondent, NN ICB). The plan for Nottinghamshire is set out from [655].

40. Essentially the plan was to formally merge the six CCGs into one Nottinghamshire wide CCG and for that to then become, as it has, NN ICB. The six Nottinghamshire CCGs formally merged on 1 April 2020 to create NN CCG and that body was dissolved and replaced by the respondent on 1 April 2022.

41. The government's policy on transfers of staff within the public sector is contained within a document known as the Cabinet Office Statement of Practise on Staff Transfers in the public sector (COSOP). That policy is essentially that in public sector reorganisations where functions are transferring from one public body to another, either TUPE will apply or, if it does not, then the parties should so far as possible operate as if it did. It is noted that in the NHS the Secretary of State has the power to make transfer orders relating to the transfer of property and/or staff which includes the transfer of liabilities.

42. C1's continuous employment with NC CCG began on 1 April 2013 [104]. We note that in the body of the contract C1's continuous NHS service is stated to be from 1 April 2011 [107]. We note that there is a difference between

continuous service for statutory purposes and continuous NHS service which is a matter of contract.

43. C1's contract of employment was as a GP Clinical Lead for 3 sessions per week and his employment contract is at [105 – 118]. Clause 17 of the contract is as follows:

> "**17 Terms and Conditions**
>
> With the exception of terms and conditions that are explicitly covered in this contract, employees should refer to the terms and conditions of service set out in Agenda for Change: NHS Terms and Conditions of Service Handbook. Documents referred to within the Terms and Conditions do not form part of your employment contract (save weather expressly stated to be) and may be altered from time to time. All such documents will either be distributed to you or made available for inspection by NHS Nottingham City Clinical Commissioning Group's human resources team."

44. Whilst we consider the drafting could have been clearer, we find that the above was sufficient to incorporate the terms and conditions of service set out in the document known as Agenda for Change: NHS Terms and Conditions of Service Handbook save where there is duplication of a clauses in C1s contract, in which case C1s contract applies. However, we would point out at this stage that no evidence was given about the terms and conditions set out in the Agenda for Change Handbook and in particular section 16, which deals with redundancy, and its relevance to the argument that the tribunal does not have jurisdiction to hear C1's breach of contract claim although we do recognise that Mr Bayne made submissions on the point which we have dealt with below.

45. It is a matter of some relevance to note that of the Nottinghamshire CCGs, only two of them, one of which was NC CCG, employed Clinical Leads with the rest engaging their Clinical Leads on a self-employed basis under contracts for services.

46. C1 also had a contract for services with NC CCG to act as NORCOM Cluster Chair but nothing related to that role/contract is the subject of these proceedings.

47. On 17 October 2018 a confidential meeting was held in Nottingham of the governing body of NC CCG. C1 attended this meeting the notes of which start at [402]. Under the heading 'Strategy and Leadership' the proposal for a Nottinghamshire wide integrated care system was discussed as was progress towards that end. That progress included the renaming of the Sustainable Transformation Partnership to the Integrated Care Partnership and the setting out of how the new system would operate across the county. It was also agreed to appoint a single accountable officer for the Nottingham and Nottinghamshire CCGs [404].

48. In November 2018 a single accountable officer was appointed for the six pre-merger CCGs.

49. On 12 December 2018 a Joint Development Session was held between the pre-merger CCGs, at which the plan for an Integrated Care System for Nottinghamshire by April 2020 was discussed [412 – 414]. This included the need to establish an ICS shadow Board and the minutes state that "*it was recognised that the board's role, and therefore its membership, will evolve over the period leading up to April 2020*" [413]. It was also at this meeting that it was agreed that the CCGs which made-up the two groups that were already working collectively would move to work as one, with the aim of creating a so-called committee in common [414].

50. On 28 February 2019 a development session of what was effectively the shadow NN CCG took place. The slides from that session start at [415]. It is apparent that detailed planning was well underway for the merger of the Nottinghamshire CCGs and had been for some time.

51. In April 2019 each of the 6 pre-merger CCGs' Governing Bodies formally agreed in principle to merge to create a single strategic commissioning organisation for Nottingham and Nottinghamshire [885].

52. During the period May and June 2019 consultation took place with GP member practises and other stakeholders in the Nottinghamshire health economy [885, and see for example 483 *et seq,* 588/589, 602]. The GPs were asked to vote on the proposals between 19 and 30 June 2019 [614]. The GPs voted in favour of the proposal.

53. On 28 June 2019 what was then named the Nottingham and Nottinghamshire ICS Primary Care Strategy was submitted to NHS England [653-768]. On 1 July 2019 the Committee in Common was created.

54. By July 2019 a process of matching existing CCG staff to roles in the proposed post-merger structure was ongoing [877]. This was completed by early August 2019 and a process called 'pooling and matching' began, which we understand was essentially a redundancy process (without any reference to the word 'redundancy') where staff who did not easily slot into a role in the new structure were matched with a vacant role, within a pool if there was more than one person who could fill the role, and any employee not matched through these processes were put at risk of redundancy with an appeal procedure available to them to challenge their redundancy [924].

55. At around this time the new integrated service launched a web site [925].

56. Staff briefings on the changes were scheduled to commence for the first week of September 2019 [948]. Staff were given a written update of progress towards integration in their monthly staff briefing a number of examples of which are in the bundle.

57. By early October 2019 new teams were being formed in readiness for the six CCGs becoming a single structure [1025].

58. On 9 October 2019 a meeting of Clinical Chairs took place notes of which are at [1359 – 1362]. This is the first mention in the bundle of documents of the Clinical Design Authority (CDA). It appears the meeting was fairly high level and was part of the move to ensure that everybody was in place ready for the merged organisation to hit the ground running on day one. The notes state:

> *"where possible clinicians should be placed in their likely final place within the CCG and system, even if it means some initial flexibility is required during times of transition. For the CCG this means it will need to link the future CDA which will sit within the provider sector"*

59. It is not entirely clear what that means because as far as the tribunal understands the position, the role of the GP Leads was to provide clinical input to commissioning decisions which is a commissioner not a provider function. Nevertheless, leaving that aside, the thrust of the meeting at this stage was, as it was with non-doctors, to ensure that everyone was in their right place prior to the new structure going live on 1 April 2020. Under the heading "*capacity CDA*" the notes again say that "*this should be a provider function*" without further explanation. What is clear from looking at the notes is that nowhere does it say that those engaged in the CDA would be engaged on a self-employed basis, nor indeed does it say they will be employed. What it says is that there should be a fluid pool of clinicians from across the system on a variety of sessions who could be directed as required.

60. On 16 October 2019 NHS England approved in principle the plan to merge the six CCGs which would result in all six being dissolved and a new body being created – NN CCG [1036]. The approval was conditional upon five specific matters:

    a. Approval of a constitution for the new CCG

    b. Appointment to the roles of Clinical Chair by 31 December 2019 and Accountable Officer by 31 January 2020

    c. All other statutory roles being filled by 27 February 2020

    d. Appointment of a new Governing Body

    e. Clarification that the role of Accountable Officer and ICS lead were separate.

61. Staff were advised of the approval on 30 October 2019 [1050].

62. Around 23 October 2019 GPs were invited to vote on the proposed constitution for the NN CCG [1069].

63. On 7 November 2019 a biannual meeting of the members of NC CCG took place. The claimant attended this meeting. The presentation slides used at this meeting start at [1084].

64. Following an enquiry to Sarah Carter from the Clinical Lead at Newark & Sherwood/Mansfield & Ashfield CCGs, Dr Marshall, about the future clinical organisational structure, she replied that she had "a*sked that clinical chairs meet quite rapidly with each individual who may be impacted by organisational change to the clinical leadership structure".* She goes on to say that:

> *"my current understanding is that the clinical leadership structure which was originally proposed remains core to the direction of travel (I understand you have seen this). the clinical leaders who are employed by the CCGs rather than paid on a sessional consultant type basis all need engaging on the approach…"*
>
> [1123]

65. On 13 November 2019 a paper was put before the Remuneration and Terms of Service Committees of the six pre-merger CCGs. The purpose of the paper was to seek approval for the payment all GPs who would be appointed to sit on the governing body of the merged organisation. In the risk section of the paper, it states as follows:

> *"There are six GPs who are substantively employed within the current CCG structure, who as a result of this agreed clinical structure proposed by the clinical chairs will be at risk of redundancy. It is proposed that each of these GPs are met in early November by the clinical chairs to discuss the proposals and to serve them with notice of redundancy, the details of which will be presented at the next remuneration committee"*
>
> [1441 – 1443]

66. On 26 November 2019 a further paper went to the same committee seeking approval for contractual redundancy pay for 7 GPs then employed within the pre-merger CCGs. under the risk section it states:

> *"No risks have been identified as a redundancy consultation process has been undertaken in accordance with employment law…"*
>
> [1444 - 1446]

67. Both of the above papers were sponsored by Sarah Carter and presented by Mr Wright. Given what was said in the paper put before the committee on 13 November 2019 the suggestion that there are no risks identified arising from redundancies was surprising. The 13 November paper states that there was a

proposal to meet GPs in early November, to discuss the proposals and to serve them notice of redundancy, and so it would appear that the decision had already been taken to serve notice of redundancy rather rendering any discussion pointless and it is surprising to the tribunal that Mr Wright at least did not consider this gave rise to considerable risk in relation to unfair dismissal if nothing else.

68. On 27 November 2019 C1 attended a meeting with Dr Porter and Sarah Carter at which he was handed the letter which appears at [1146 – 1147] giving him written notice of dismissal "*due to redundancy*". The letter of dismissal contains a calculation of C1's redundancy payment.

69. On 3 December 2019 Sarah Carter wrote to C1 to tell him that the redundancy payment calculation set out in the letter of dismissal was incorrect and to provide a revised calculation [1154 - 1155].

70. C1 queried the calculation in exchanges of emails with both Dr Porter and HR [1357, 1156, 1157, 1158 – 1159].

71. On 23 January 2020 Sarah Carter wrote to Rachel Backhouse, industrial relations officer at the BMA attaching a formal consultation document. In the letter Sarah Carter says as follows:

> *"As the industrial relations officers for the BMA in the East Midlands, I am writing to formally notify you of this transfer and to advise you that the transfer will be handled in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014"*
>
> [1168]

72. That letter and consultation document were emailed Rachel Backhouse by Mr Wright and the subject of the email was "*Nottinghamshire CCGs TUPE transfer to NHS Nottingham and Nottinghamshire CCG*". In the body of the e-mail Mr Wright states:

> *"Please find attached letter and consultation document from Sarah Carter… informing you of the proposed TUPE transfer or staff… on 1 April 2020"*
>
> 1170]

73. Ms Backhouse was not at work to receive these documents and the matter was picked up by Ms Karim on 28 January 2020, who responded to Mr Wright by asking him the number of medical staff affected and their roles. She also asked when there are any collective consultation meetings being arranged. Mr Wright responded on the same day advising her that three doctors were "*affected by this transfer*" and he went on to say

> *"We are looking to undertake this transfer with a fairly light touch as it is a result of the sixth Nottinghamshire CCGs merging and forming a new Nottingham and Nottinghamshire CCG so no alteration to terms and conditions or measures are being proposed"*
>
> [1170/1169]

74. The consultation document referred to in the correspondence starts at [1172]. The document says that the merger of the six CCGs will be a transfer under TUPE [1174].

75. On 28 January 2020 Dr Porter wrote again to C1 [1180 – 1181]. The letter confirms that C1's employment will terminate on 27 February 2020. The letter says that the CCG has explored ways in which redundancy could be avoided but that there was new suitable alternative employment for C1. The letter also says as follows:

> *"I would be grateful if you could complete the attached notice of termination form which will need to be completed and returned to Gemma Waring, Head of HR and OD who will then ensure that payroll action your final payments"*

76. On 29 January 2020 C1 applied for a GP Lead role in the new CCG. This role was on the basis of a self-employed contract [1212].

77. There were further exchanges of emails between C1 and Mr Wright regarding the calculation of redundancy pay [1199, 1200].

78. On 7 February 2020 Mr Wright send an e-mail to C2 in which he stated

> "*it has been decided by the current Clinical Chairs and Governing Body that going forward that the CCGs wouldn't have employed clinical advisors and that the roles would be advisory roles rather than doing roles"* (sic)
>
> [1201]

79. On 13 February 2020 C2 wrote to Mr Wright on behalf of C1 and ask expressly whether C1's contract of employment was "*classed as VSM".* In response Mr Wright states that C1 "*is currently employed… under a VSM contract*" [1205 – 1207]. This was clearly incorrect given that the contract which C1 was employed under expressly incorporated the entire Agenda for Change terms and conditions of employment.

80. On 26 February 2020 C1 was interviewed for the position of GP Lead in the new organisation.

81. C1's employment terminated on 27 February 2020. On 2 March 2020 C1 was advised that he had been unsuccessful in his application for one of the self-employed GP Lead roles in the new organisation [1210].

82. On 9 March 2020 NHS England authorised the disestablishment of the six CCGs and the establishment of the new NN CCG [1220-30]. The new organisation began life on 1 April 2020.

83. Early conciliation started on 22 May 2020 and early conciliation certificates were issued on 22 June 2020.

84. The claim form was presented on 21 July 2020.

85. On 1 July 2022 NN CCG was dissolved and the respondent was established.

Discussion and conclusions

Was there a TUPE transfer?

86. This was the key questions we were required to answer. We note that in essence both parties drew our attention to the same case law and asked us to come to entirely different conclusions based on the same facts and the same cases.

87. For there to be a transfer of an undertaking there has to have been the transfer of an economic entity from one person to another. An economic entity is an undertaking which carries on economic activity.

Examples from the decided cases

88. We pause to note that decided cases on the application of Regulation 3(5) offer little practical help on determining how to approach such cases. The following examples were considered.

    a. **Collino and anor v Telecom Italia SpA** 2002 ICR 38, ECJ there was a relevant transfer when the Italian Minister for Posts and Telecommunications dissolved ASST, the state body responsible for operating certain public telecommunications services, and granted the exclusive concession in respect of those services to a state-owned company, Iritel.

    b. **Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca** 2012 ICR 740, ECJ, where the ECJ held that the **Henke** exception did not apply to the transfer of a group of school cleaners from the employ of a local authority to that of the state.

    c. **Piscarreta Ricardo v Portimão Urbis EM SA and ors** 2017 ICR 1451, ECJ, in which the ECJ held that the transfer principle applied to a situation where a municipal undertaking, the activities of which included the management of tourism, cultural events and public spaces, and whose sole shareholder was the municipality, was wound up by the municipality and its activities transferred partly to the municipality itself.

d. **Law Society of England and Wales v Secretary of State for Justice and Office for Legal Complaints** 2010 IRLR 407, QBD, in which the High Court was asked by the Law Society to make declarations about the applicability of TUPE in the context of the imminent cessation of the Law Society's Legal Complaints Service (LCS) and its replacement with a new independent Office for Legal Complaints (OLC). It held that the **Henke** exception applied.

e. **Middle School Governing Body v Askew** [1997] ICR 808, EAT in which the EAT refused to apply **Henke** in the case of a transfer of a state school between two governing bodies.

f. **Highland Council v Walker** EAT/817/97 (25 November 1997, unreported) in which the EAT in Scotland refused to apply **Henke** to a Compulsory Competitive Tendering case where a Council took back from an external contractor, the provision of dog warden services.

g. **Dundee City Council v Arshad** EAT/1204/98 (14 January 1999, unreported) where the EAT declined to apply **Henke** in the context of a local government reorganisation in Scotland during which, as a result, a residential home was transferred from one (abolished) Regional Council to three new unitary authorities.

h. **Adult Learning Inspectorate and Others v Beloff** [2008] All ER (D) 254 (Jan), EAT, where regulation 3(5) was held to apply and, therefore, there was no relevant transfer when the Adult Learning Inspectorate (ALI), a body funded largely by the government to carry out inspection work nationally in respect of further education and vocational and work-based training, was taken by the government to merge Ofsted,

89. We accept that we must undertake a "functional approach" to determine the nature of the activities of the transferor - **Nicholls v London Borough of Croydon and others** UKEAT/0003/18 [2019] ICR 542.

90. The tribunal must decide whether the activities of NC CCG constituted an "economic activity" or "public administrative functions" as it is only where the activities are an "economic activity" that they will be within the scope of "relevant transfer" under TUPE. If they are "public administrative functions", the transfer will fall within the exclusion in Regulation 3(5).

91. It seems to us that the starting point is to determine what activities were carried on by NC CCG prior to the transfer (we are using the word transfer here in the non-technical sense) and then to consider whether those activities were "economic activity". But to do that exercise we must first consider what is meant by "economic activity"

Economic activity

92. The definition of "economic activity" is perhaps best defined as "any activity consisting in offering goods and services on a given market" (see for example **Ambulanz Glockner v Landkreis Sudwestpfalz** [2002] 4 CMLR 21).

93. It is relevant to consider whether the activity consists in the provision of goods and services as opposed to merely acquisition and whether there is a market for the relevant goods or services.

94. If there is a market, the provision of goods and services on that market is an economic activity (**Hofner and Elser v Macroton GmbH** (Case C-41/90) [1993] 4 CMLR 306, **Dr Sophie Redmond Stichting v Hendrikus Bartol and others (**Case C-29/91) [1992] 003 ECR I-3189 and **Scattolon v Ministero dell'Instruzione, dell'Universita et dell Ricerca** [2011] IRLR 1020).

95. It is relevant to that consideration whether the activity is capable of being carried on, at least in principle, by private undertaking with a view to profit (**Ambulanz Glockner**, **Diego Cali & Figli Srl v Servizi Ecologici Porto di Genova SpA (**SEPG) (Case C343/95) [1997] ECR I-1547; [1997] CMLR 484, CJEU).

96. There can be such a market even if the goods are provided by the state or a state authorised entity, all the goods all services are being provided by one state body to another and the entity providing the economic activity can be a public law entity, publicly funded, acting in the public interest and acting pursuant to statutory functions.

Functions of NC CCG

97. CCGs were groups of local GP practices whose governing bodies included GPs, other clinicians such as nurses and secondary care consultants, patient representatives, general managers and – in some cases – practice managers and local authority representatives.

98. The pre-2022 system for commissioning healthcare services was based on arrangements set out in the Health and Social Care Act 2012 (which amended the NHS Act 2006), which aimed to put GPs at the forefront of the commissioning process. To that end, CCGs had a statutory responsibility for commissioning most NHS services including urgent and emergency care, acute care, mental health services, community services and some specialised services. This involved assessing local needs, deciding priorities and strategies, and then buying services on behalf of the population from providers such as hospitals, clinics, community health bodies, etc. It is an ongoing process. CCGs had to constantly respond and adapt to changing local circumstances. They were responsible for the health of their entire population and measured by how much they improve outcomes.

99. In short, commissioning is essentially the process by which health and care services are planned, purchased and monitored. So, in this context "commission" means "buy". It does not mean "provide".

100. CCGs were of course creatures of statute. The law relating to CCG functions was set out in the National Health Service Act 2006 thus:

"1I Clinical commissioning groups and their general functions

(1) There are to be bodies corporate known as clinical commissioning groups established in accordance with Chapter A2 of Part 2.

(2) Each clinical commissioning group has the function of arranging for the provision of services for the purposes of the health service in England in accordance with this Act.

2 General power

The Secretary of State, the Board or a clinical commissioning group may do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function conferred on that person by this Act"

Chapter A2, Part 2 [sets out the general duties of CCGs as follows:]

- *To promote the NHS constitution*
- *To exercise their functions effectively, efficiently, and economically*
- *To improv e the quality of services*
- *To have regard to reducing inequalities*
- *To promote involvement of patients*
- *To enable patient choice*
- *To obtain appropriate advice*
- *To promote education and training*
- *To promote research*
- *To promote integration*

101. As is clear from s.2 of the 2006 Act, set out above, a CCG has to have regard to these general duties in exercising its core function as we have set them out above – to arrange for the provision of health services. Thus, whatever the CCG does which is not commissioning services (or monitoring them) is subordinate to its overarching duty to commission healthcare services.

102. Given the role played in the case by Mr Wright, we should also mention that Commissioning Support Units (CSUs) helped and continue to help provide support and services for CCGs such as finance, HR, data management, or contracting. CCGs can buy services from CSUs or to carry them out in-house, whichever they feel is most efficient and appropriate. CSUs are procured by CCGs via the NHS England Lead Provider Framework.

103. We note the evidence of C1 that NC CCG provided training to its staff, that it signposted patients to relevant services and undertook some other peripheral matters. We did not accept the claimant's evidence regarding the provision of pharmacy services which services are, we understand from the legislation commissioned by the NHS Board and not CCGs and we accept the point given in evidence by Dr Porter that the CCG was not registered to provide medical services and in our judgment it is extremely unlikely that it did so, and we find it did not.

Did NC CCG carry out economic activity?

104. In **Nicholls v London Borough of Croydon and others** [2019] ICR 542, Lavender J held at paragraph 42:

> *"(1) the purchasing or commissioning of goods or services cannot in itself constitute an economic activity; but*
>
> *(2) a body which supplies goods or services on a market is carrying on an economic activity, both in supplying those goods or services and in purchasing goods or services for the purpose of that supply"*

105. We find that the principal work of NC CCG was to commission healthcare services from providers to be delivered by those providers to the public. That falls squarely within the first limb of paragraph 42 of **Nicholls** and in our judgment, there is nothing in the present case to enable us to depart from that precedent. CCGs do not and NC CCG did not supply goods or services on a market. It was not, without more, undertaking an economic activity. In that case Regulation 3(5) applies and there was no relevant transfer when NC CCG was dissolved, and its work transferred to NN CCG.

106. However, we should address the argument that the purchasing of services to be provided by a third party can amount to an economic activity either in and of itself (as Ms Motraghi contends for in her detailed submissions) or because that falls within the second limb of paragraph 42 of **Nicholls**.

107. In this context we heard detailed argument from Ms Motraghi on the case of **FENIN v Commission of the European Communities and another** (Case C-205/03) [2006] 262 CMLR 7.

108. We accept the points made by Ms Motraghi that the Court of Justice has emphasised that activities which involve the offer of goods and services on a given market must be regarded as economic in nature notwithstanding that:

a. they are not carried on with a view to making a profit (**The Dr Sophie Redmond Stichting** and **Re Business Transfers: EC Commission v United Kingdom** (Case C-382/92) [1995] I CMLR 345)

b. they are entrusted to a body which forms part of the public administration or is governed by public law (**Collino and another v Telecom Italia SpA**

[2002] ICR 38, and **Mayeur v Association Promotion de l'Information Messine (APIM)** (Case C-175/99) [2002] ICR 1316)

c. they are carried out in the public interest or for the general good (**Mayeur**, and **Scattolon**).

109. But as we have found, a key point is that the CCG did not **provide** goods or services. It's central, key function was to **commission** others to provide principally services.

110. We understand that Ms Motraghi's challenge on this point is based on an analysis of the Advocate General's opinion in **FENIN**. We note that **FENIN** is not an employment case but a competition case. However, the relevant definitions in EU competition law are the same as those in the Acquired Rights Directive upon which TUPE is based.

111. The point made by Ms Motraghi was that the Advocate General in **FENIN** said it is appropriate in a commissioning case to consider what use the purchased goods will be put to and if that use is an economic activity, then so is the purchasing of the goods. In **FENIN** the Advocate General said as follows

> *"There was no need to dissociate the activity of purchasing goods from the subsequent use to which they were put in order to determine the nature of that purchasing activity. The nature of the purchasing activity had to be determined according to whether or not the subsequent use of the purchased goods amounted to an economic activity. There was therefore no need to examine the purchasing activity of the SNS management bodies separately from the service subsequently provided"*

112. Ms Motraghi says we should apply this approach and thus to not dissociate the commissioning of services by the CCG from their delivery by the actual providers of the services and if the delivery amounts to an economic activity, so does the commissioning (i.e. the purchasing) of them.

113. Significantly, the Court of Justice did not consider this aspect of the Advocate General's opinion because it determined that it was part of the grounds of appeal it could accept as it was not argued in the courts below it, and thus it is not part of the Court's decision and remains the opinion of an Advocate General. In our judgment, we cannot be bound by the opinion of an Advocate General and ignore the binding precedent of the EAT as set out, in this case, in **Nicholls**.

114. Given the clear judgment in **Nicholls** we do not consider that we need to go on to consider the ten points set out by Lavender J to try to determine whether the activity is or is not economic. That would be relevant if the position were not clear, but it is - the purchasing or commissioning of goods or services cannot in itself constitute an economic activity and given that the CCG does not supply goods or services (which is necessary for the second limb of paragraph 42 of **Nicholls** to apply) we consider that the **Nicholls** judgment means that the dissociative approach remains the default position.

115. We should just deal with something of a curiosity on this case.

116. As set out in our findings of fact it seems to us that those involved in the creation of NN CCG were operating under the presumption that there would be TUPE transfers of the pre-merger CCGs to NN CCG. All of the documentation says so. We found the evidence Ms Carter and Mr Wright less than convincing when they sought to resile from that position. Indeed, we found Mr Wright's evidence, that he was always aware that TUPE did not apply but drafted letters confirming that it did in order to not cause alarm amongst staff, literally incredible. Mr Wright Is a very senior HR professional. He and his team advise a number of NHS bodies and if his evidence is to be believed, he took a conscious decision to mislead around 500 staff across the six pre-merger CCGs. We say mislead because technically if there were no TUPE transfers the dissolution of the CCG employers put all staff at risk of redundancy and they should have been given a choice whether to accept any job offered to them in the new structure as alternative employment. By effectively pretending that there was to be TUPE transfers of NC CCG and the other pre-merger CCGs were denying employees their statutory rights. The alternative is that Mr Wright and Ms Carter were not being honest when they gave their evidence to us, that they did think that TUPE would apply and chose to deny that in their evidence because the respondent was now seeking to argue that TUPE did not apply, and given that in their responses to these claims the original position of the respondent was to accept that there was a TUPE transfer, and only rather late in the day did they change their stance on that and deny there was a transfer, we tend towards the latter explanation for in particular Mr Wright's evidence on the point.

117. Of course, just because a business, undertaking or public body believes what they are doing or proposing to do amounts to a relevant transfer, does not mean that it is or was. We have to look at the facts and apply the law to those facts, and as we have found, given that this is a case where the purported transferor principally commissioned services and anything else it did was ancillary to, and in support of that central commissioning function, we find that Regulation 3(5) TUPE applies and that NC CCG was not carrying out economic activities and it was not an economic entity and therefore there was no transfer of an undertaking when it was dissolved and its functions taken on by NN CCG.

Unfair dismissal

118. Given our finding above, it follows that C1 could not have been automatically unfairly dismissed, that is to say dismissed because of the transfer. Nor is it strictly necessary for us to consider whether his dismissal was for an ETO reason.

119. However, having said that, we are well aware that our findings on whether there was a TUPE transfer may be the subject of an appeal and we consider that if we are found to have been wrong about the application of TUPE in this case, and there was a relevant transfer, we ought to go on consider whether, if that was the case, C1's dismissal was automatically unfair under

Regulation 7(1) or unfair under Regulation 7(2) given that we have heard all of the evidence relevant to those claims.

Automatic unfair dismissal

120. If the sole or principal reason for the dismissal of an employee eligible to claim unfair dismissal is the transfer, that is the end of the matter: the dismissal will be automatically unfair under Regulation 7(1) TUPE. On the other hand, if the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce, then the dismissal will not be automatically unfair but may be rendered unfair by virtue of the ordinary 'fairness' test set out in S.98(4) ERA (see Regulation 7(2)). We consider Regulation 7(2) below. Further, if the reason for dismissal has nothing to do with the transfer, then the law of unfair dismissal applies without any consideration of TUPE.

121. In **Marshall v Game Retail Ltd** UKEAT/0276/13 (13 February 2015, unreported), the EAT clarified the burden of proof where it is alleged that the dismissal is by reason of the transfer. In the view of the EAT, once the claimant has produced some evidence in support of his case, the burden lies on the respondent to establish that the reason for dismissal was not the transfer.

122. The discussion below is on the presumption that there was a TUPE transfer on 1 April 2020, although for the reasons set out above, we have found that there was not.

123. The question of whether a dismissal is rendered automatically unfair by reason of the transfer is primarily one of causation: 'Was the transfer the sole or principal reason for dismissal?' This is a question of fact to be determined by the employment tribunal in the circumstances of the case. We agree entirely with the submission of Mr Bayne that we should not apply a "but for" test.

124. A number of issues may be relevant to ascertaining the answer to the question we have posed above, depending on the circumstances of the particular case. These include:

a. the timing of the dismissal

b. the reason for dismissal, i.e. the factors operating on the employer's mind; and

c. whether the specific transferee had been identified by the time the dismissal took place.

125. It is apparent from the evidence we heard that it has been a long-term plan to create what we now see as the respondent in this case, that is integrated care services (ICS) incorporating health and social care overseen by integrated care boards (ICB) such as the respondent. This would appear to have been the plan since around 2014 and certainly since 2017 [1090].

126. As part of the process towards creating integrated services, in 2017 NC CCG joined with the three other CCGs in the South of Nottinghamshire to form what became called the Greater Nottingham Commissioning Partnership.

127. In 2018 Deloitte produced a report headed "Future commissioning and provider system architecture in Nottingham and Nottinghamshire ICS" [204 *et seq*]. That report was commissioned by NHS Mansfield & Ashfield CCG. It is entirely clear from that report that the direction of travel was the creation of what we now see as the respondent in this case. Part of the plan was to work from an early stage to design the future operating model for integrated care, to merge functions across the CCGs and to then merge the CCGs themselves [see for example 253]. By 2018 the 6 pre-merger CCGs in Nottinghamshire had been awarded integrated care system status as one of eight such systems in England leading the development of what is termed a whole system partnership working to achieve integrated strategic commissioning and delivery of care [288].

128. In 2018 all of the CCGs in Nottinghamshire save for Bassetlaw agreed that they would formally merge which was in line with the NHS long term plan [1102]. Of course, as we now know, they merged on 1 April 2020.

129. It seems to the tribunal that the creation of the respondent in this case has been planned for a considerable period of time and all of the various structural and functional changes have been to achieve that objective, that is to say an integrated care board running an integrated care system of healthcare and social care services. Nottinghamshire has essentially moved from seven individual CCGs to a system in which Bassetlaw CCG continued to work as a separate CCG, in mid-Nottinghamshire two CCGs began to work as one organisation and in southern Nottinghamshire four CCGs worked as one organisation. The next stage was for the mid- and southern Nottinghamshire CCGs to work together without formally merging and then to formally merge to create NN CCG which itself was a step in the creation of the current respondent in this case.

130. The evidence of the respondent's witnesses was that the direction of travel was always greater integration.

131. We have set out above a detailed timeline of events in this case. As we understand the evidence it was a proposal that NN CCG would not employ Clinical Leads and that those roles would sit within what has become called the CDA, although we stress that this is not a separate organisation, a separate NHS body, it is simply a name to delineate where the Clinical Lead roles sat within the NN CCG organisation.

132. Having said that, the evidence is that in fact NN CCG did employ three Clinical Leads namely Dr O'Neil, Dr Gladman and Dr Johnson. None of these three was ever put at risk of redundancy, they were slotted into employed roles in readiness for NN CCG to go live on 1 April 2020.

133. So, it is apparent from all of the evidence that all of the planning both workforce and work stream, was done well in advance of 1 April 2020 and this included ensuring that everyone who would have a role in NN CCG was in place prior to 1 April 2020, and anyone who did not have a role in NN CCG was dismissed or at least given notice of dismissal prior to that date. And as we know C1 was given notice and his employment terminated just over one month before 1 April 2020.

134. The stated reason for dismissal is that the new CCG was not going to employ Clinical Leads. this was the evidence of all of the respondent's witnesses. This of course is not true because as we have said above, three doctors did continue to be employed as Clinical Leads, but the respondent seeks to differentiate those roles from the self-employed Clinical Lead roles which were to and do sit within the CDA. According to the evidence of Dr Porter, Drs O'Neil, Gladman and Johnson provide clinical advice in various areas of practise to the respondent. Also, according to Dr Porter, the self-employed doctors engaged within the CDA provide clinical advice, leadership and input to the respondent. The tribunal cannot see the difference between these two roles although we accept that each Clinical Lead has different skills, areas of expertise and experience. But we accept the evidence of C1 that as a GP of many years standing he has experience and expertise in a number of areas although as he conceded this would not include digital architecture which appears to be the specialist area of Dr O'Neil but it would for example include experience and expertise in relation to the 111 service which one of the employed Clinical Leads advises on.

135. Given our findings, in our judgment, C1 has produced some evidence in support of his assertion that the sole or principal reason for dismissal was the transfer.

136. As to the timing of a dismissal in the context of a relevant transfer, we note the decision of the Court of Justice in **P Bork International A/S (in liquidation) v Foreningen af Arbejdsledere i Danmark and ors** 1989 IRLR 41, ECJ. In this case the European Court of Justice (ECJ) held that it was for national courts to determine whether a dismissal was 'by reason of' a relevant transfer, by considering the objective circumstances in which the dismissal occurred. The ECJ stated that a court should take particular note of whether the dismissal in question took place at a time close to that of a relevant transfer and whether the employee was subsequently re-engaged by the transferee.

137. In **Hare Wines Ltd v Kaur and anor** 2019 IRLR 555, CA the Court of Appeal took the ECJ's decision in **P Bork** (above) to mean that although proximity of the dismissal to the transfer is not conclusive, it is strong evidence in the employee's favour. We also note that many of the cases dealing with dismissals shortly before a transfer, where the court has found that the reason for dismissal was not the transfer, involve circumstances where the purported transferor is in financial difficulties and had to take decisions quickly which is not the case in the present case, indeed the exact opposite is true. As we have found above, the creation of the respondent was long in the planning.

138. The matter most significantly relied upon by the respondent in arguing that the reason for dismissal was not the transfer is that C1's redundancy would have happened in any event because a decision had been taken that the CCGs would no longer employ Clinical Leads and thus C1 would have been made redundant even if the merger had not gone ahead on 1 April 2020.

139. We reject that argument for two reasons. The first reason is that manifestly Clinical Leads continued to be employed. Drs O'Neill, Johnson and Gladman continued to be employed Clinical Leads within NN CCG and so patently a decision was not taken that there would be no employed Clinical Leads. The second reason is, as we have said, the plan to have a CDA, and indeed all of the restructuring plans of the six pre-merger CCGs was done with the objective of formal merger and creation of NN CCG and therefore, on the presumption that that was TUPE transfer, the workforce planning was in contemplation of and for the purposes of creating the shape of the new NN CCG prior to that transfer.

140. The question we have to ask is what was in the mind of the person whose decision it was to dismiss. In **Kuzel v Roche Ltd** [2008] ICR 799 (a case concerning a s103A ERA dismissal claim), Mummery LJ said this about identifying the reason for a dismissal

> *"...the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge."*

141. One of the most interesting aspects of this case was trying to determine who in fact took the decision to dismiss C1. It appears to the tribunal that none of the witnesses we heard from would take ownership of that key decision. Further, none of them could say who took the decision to dismiss C1.

142. We note that Dr Shortt accepted, when put to him by Ms Motraghi in cross examination, that the reason C1 was dismissed was because of the merger which was due to take place on 1 April 2020. But of course, he was not the decision maker and therefore what operated on his mind is of little relevance.

143. Given that we were not presented with a witness who was prepared to accept that it was their decision to dismiss we have to try to work out what the reason was likely to have been given all of the surrounding circumstances.

144. Of interest in this context is the case of **Hare Wines Ltd** (above) where an employee was dismissed shortly before the transfer, but the motive of the new employer in encouraging the dismissal of the employee was to avoid employing the employee because she had ongoing difficulties in her working relationship with another employee in scope for transfer, who would be her supervisor going forward. The EAT and Court of Appeal considered that the sole or principal reason for the dismissal was the transfer and was therefore automatically unfair. As we have said above, an important factor which may be taken into account in deciding the reason for dismissal is its proximity to the

transfer. The Court of Appeal in **Hare Wines** noted that although proximity to the transfer is not conclusive, it is often strong evidence in the employee's favour. As Bean LJ said

> *"Once it was found that Ms Kaur had not objected to the transfer the central question became whether (a) she was dismissed because she got on badly with Mr Chatha (who was about to become a director of the business) and the proximity of the transfer was coincidental, or (b) she was dismissed because the transferee did not want her on the books, the reason for that being that she got on badly with Mr Chatha. Which of these two was the sole or principal reason was a question of fact and the employment judge was entitled to prefer the latter to the former….The judge found that the transferee company anticipated that there would be ongoing difficulties in the working relationship between the Claimant and Mr Chatha. It therefore decided that it did not wish her contract of employment to transfer and communicated that wish to the transferor. That was why she was told that she was not wanted. The reason for the dismissal was the transfer."*

145. In the present case we have no doubt that C1 did not simply want to transfer to NN CCG but expected to. It seems to the tribunal that the respondent did not want him to be employed in NN CCG once it commenced operation on 1 April 2020. This would explain why despite having relevant skills, interests, and experience, he was not pooled for redundancy selection with at least Drs Gladman and Johnson. It would also explain why there was no redundancy process; no warning, no consultation, no consideration of pooling at all, and on the face of the evidence we had no search or at least no proper search for alternative employment, there was merely a statement that there was no "*suitable alternative employment*" for C1 [see 1180].

146. We also note that C1 was not told in advance that the meeting he had with Sarah Carter and Dr Porter on 27 November 2019 was to do with redundancy, he was not afforded the right to have somebody accompany him to the meeting and given that he was handed the letter of dismissal which we see at [1146] at the meeting, clearly nothing he could have said at that meeting would have changed the respondent's mind (and we say the respondent's mind because again no one is prepared to say who took the decision to dismiss in this case).

147. It seems to the tribunal this is a case in which it was decided that the respondent did not wish C1's contract of employment to transfer and that wish was communicated to him on 27 November 2019 when he was given notice of termination.

148. For those reasons we find that had there been a relevant transfer in this case C1's dismissal would have been automatically unfair having been by reason of the transfer.

Unfair dismissal – Regulation 7(2) TUPE

149. Again, on the presumption that there was a relevant transfer in this case, and on the further presumption that we are wrong about, if that was the case, the sole or principal reason for the dismissal being the transfer itself, we should go on to consider whether the dismissal would have been for an ETO reason.

150. The onus is upon the dismissing employer to establish that the reason for dismissal was an economic, technical or organisational one (see **Forth Estuary Engineering Ltd v Litster [**1986] IRLR 59, EAT). Moreover, it should be noted that the reason must be one entailing changes in the workforce (Regulation 7(2) of TUPE and see **Berriman v Delabole Slate Ltd** [1984] IRLR 394, EAT, [1985] IRLR 305, CA). The Court of Appeal in **Berriman** held that 'changes in the workforce' meant a change in the overall numbers or functions of the employees. As Browne-Wilkinson LJ stated in **Berriman**

> *"Changes in the identity of the individuals who make up the workforce do not constitute changes in the workforce itself so long as the overall numbers and functions of the employees looked at as a whole remain unchanged"*

151. However, the EAT, in **Nationwide Building Society v Benn** [2010] IRLR 922, EAT, took the view that the changes need not entail the entire workforce—it was enough that a section of employees were affected, in that case, the group of transferring employees.

152. We consider that we can answer the question as to whether C1's dismissal was for an ETO reason quite shortly.

153. It was held by the Scottish Court of Session Inner House in **Hynd v Armstrong** [2007] IRLR *338* that a transferor cannot rely upon a transferee's economic, technical or organisational reason for dismissal. In that case there was a de-merger of a law firm. A solicitor was made redundant by the original firm in anticipation that one of the new, de-merged, firms would no longer have a requirement for the solicitor's services. Whilst the transferee, if it had dismissed after the transfer, might have had an economic, technical or organisational reason entailing changes in the workforce, the transferor could not rely upon this. For the dismissal by a transferor to be for an ETO reason, it must relate to the transferor's future conduct of the business, which is a condition that cannot be met when the transferor has no intention of continuing the business.

154. Giving judgment in the court, Lord Reed said

> *"In the present case, Morison Bishop [the old employer] could not lawfully have dismissed the appellant on the ground of redundancy, according to the findings of the tribunal, if they had had regard only to their own requirements as employers. A finding of unfair dismissal could*

therefore be avoided only on the basis that regulation 8(2) extends the circumstances in which an employer can make his employees redundant: in particular, by entitling an employer to dismiss his employees prior to a transfer of the undertaking, on the ground of redundancy, where the employees are surplus to the requirements of the transferee. To interpret article 4(1) as having that effect would not in our view *be consistent with the intention of the Directive, as the Court of Justice has explained it…*

That conclusion is fortified by two further considerations. First, if article 4(1) is interpreted as permitting the transferor to dismiss employees prior to the transfer because the employees will otherwise be surplus to the transferee's requirements, the consequence is that article 3 will not apply in such circumstances (since there will be no contract of employment in existence on the date of the transfer), and the obligations of the transferor arising from the dismissal will therefore not be transferred to the transferee. In a situation where the transferor is insolvent, there will be every incentive (if article 4(1) is so interpreted) for redundancies to be effected by the transferor in advance of the transfer rather than by the transferee after the transfer, so that liabilities to the employees made redundant can in practice be avoided. That result would be inconsistent with the objective of the Directive, mentioned in the third recital, "to provide for the protection of employees". Secondly, in a situation where the combined workforces of the transferor and the transferee are greater than the transferee will require after the transfer, and where redundancies will therefore be necessary, an interpretation of article 4(1) which permits the transferor to effect redundancies for that reason in anticipation of the transfer will enable the selection of employees for redundancy to be made solely from the transferor's workforce, and will thus relieve the transferee of the need, which would otherwise arise, to consider all the employees of the combined workforces on an equal footing. Such a conclusion would again run counter to the intention of the Directive

> *""to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer"."'*

155. There was no evidence before us that NC CCG had in relation to the conduct of its business given any thought to not having employed Clinical Leads. All of the discussions about the change to a uniform self-employed model across the six pre-merger CCGs was done collectively in contemplation of either merger or even closer working.

156. We consider that if there was a relevant transfer in the present case, and bearing in mind our finding that we did not accept that C1's redundancy would have happened in any event that is to say *absent* the planning for the creation of the integrated service, we find that NN CCG did not have an ETO reason for

C!'s dismissal and that therefore It cannot be shown that there was a potentially fair reason for his dismissal at the time he was dismissed and his dismissal was unfair for that reason alone.

Unfair dismissal s.98 ERA

157. We turn next to what we might call ordinary unfair dismissal which again we can deal with quite shortly.

158. It was essentially conceded by Mr Bayne in his oral submissions that the dismissal was procedurally unfair if nothing else. He argued that if there was an unfair dismissal which was not automatically unfair then we should apply the case of **Polkey v AE Dayton Services Ltd** [1987] UKHL 8 and by inference we are invited to include as part of this decision our judgment as to whether, had a fair procedure being followed, the claimant would have been dismissed in any event.

159. In this case there was an entire lack of process which renders the dismissal procedurally unfair if nothing else. However, that is far from the end of the matter.

160. We have found that the decision to make C1's post redundant and therefore to dismiss him would not have taken place had there not been in train at the relevant time plans for reshaping the commissioning landscape in Nottinghamshire in readiness for the creation of NN CCG and ultimately the respondent.

161. On the evidence we heard NC CCG had made a conscious decision, along with one other of the pre-merger CCGs, to employ its Clinical Leads rather than engage with them on a self-employed basis and, as we noted above, there was simply no evidence before us from which we could possibly conclude that this would not have continued to be the case *absent* plans to merge the CCGs. Indeed, all of the evidence suggests that the only reason the position to have employed Clinical Leads in NC CCG changed was because a collective decision had been taken that going forward it would be preferable to have the Clinical Leads across all six pre-merger CCGs on the same type of contract and the preference, again collectively, was for that to be on the basis of contracts for services i.e. for the clinical Leads to be self-employed.

162. In our judgment there is no evidence from which we could conclude that had there been no merger plans in progress the claimant would in any event have been put in a redundancy situation and he would have been dismissed as redundant by NC CCG

163. In our judgment the respondent has not shown that it had a potentially fair reason for C1's dismissal given that all of the evidence we heard was around making redundancies as part of restructuring the commissioning service in anticipation of a formal merger of the CCGs.

164. For those reasons we find that the claimant's dismissal was unfair.

Breach of contract

165. C1's claim here is that he did not receive the correct amount of contractual redundancy pay.

166. The respondent says that the tribunal does not have jurisdiction to hear this claim because the claim for a contractual redundancy payment did not arise on termination of the employment nor was it outstanding at that time.

167. As we have found above, C1's contract of employment incorporates the entire Agenda for Change Handbook (AfC). AfC contains detailed terms and conditions of employment for all NHS staff save for doctors, dentists and those on the very senior manager contract.

168. Unfortunately, AfC was not part of the documentation provided to the tribunal. As a matter of submission, Mr Bayne said that a person who believes they are entitled to a contractual redundancy payment under AfC Is required to certify that they have not obtained, been offered or unreasonably refused to apply for or accept suitable alternative health service employment within four weeks of the termination date of their employment by reason of redundancy.

169. In the absence of AfC documentation we have turned to the only document we can find in the bundle which deals with the question of eligibility for a redundancy payment. Dr Porter wrote to C1 on 28 January 2020 [1180 - 1181]. In that letter he states as follows

> "*As previously advised your redundancy payment has been calculated as £16,000.00 (a copy of this estimate is attached for your records). this will be paid free of income tax and National Insurance deductions. I would be grateful if you could complete the attached notice of termination form which will need to be completed and returned to Gemma Waring, Head of HR & OD, who will then ensure that payroll action your final payments"*

170. The termination form appears at [1182 – 1184]. Most of the form is to be completed by the line manager but Section 5 which is headed "Authorisation" is to be signed by a number of people including the employee and, further, the employee should sign the last page under Section 2. As we understand the evidence C1 did not complete this form and given that he was told expressly that this would need to be completed and returned to Ms Waring, we agree with the respondent, although not for the reasons they submitted, that at the date of termination C1 had a statutory right to a statutory redundancy payment, which he clearly received, but his right to a contractual redundancy payment was contingent on completing the form he was sent on 28 January 2020. It follows from this that we agree that we do not have jurisdiction to hear the claim for breach of contract.

Information and consultation

171. Finally, we turn to the claim brought by the BMA.

172. Given that we have found there was no relevant transfer in this case it follows that there can have been no failure to inform and/or consult under TUPE and the claim must fail.

173. However, as with the claim for automatic unfair dismissal, given that we heard all of the evidence and given the possibility that our decision or whether or not there was a relevant transfer may be the subject of an appeal, it seems sensible for us to go on to consider whether, if there had been a relevant transfer, the claim for failure to inform and/or consult under TUPE would have been successful.

174. Regulation 13 TUPE requires that in every case of a relevant transfer the transferor shall inform in this case the BMA, of specified matters set out in Regulation 13(2) and (2A) and that they shall do so long enough before the transfer to enable the consultation of representatives of affected employees.

175. Regulation 13(4) imposes an obligation on a transferee to provide information to the transferor about any measures it proposes to take in relation to affected employees of the transferor to enable the transferee to comply with its obligation to provide information under Regulation 13(2).

176. We start with some necessary definitions.

177. In order to be an 'affected employee', an individual must be:

a. an 'employee' for the purposes of the TUPE Regulations, which C1 was,

b. an employee of either the transferor or the transferee (not a third party), and as we know C1 was an employee of a transferor, NC CCG, and

c. someone who may be affected by the transfer or by measures taken in connection with it. It is important to note the use of the word 'may' rather than 'will' — meaning that an employer does not have to be sure that an employee will be affected in order for Regulation 13 to be triggered in respect of that employee. We shall return to this point below.

178. The transferor must inform employee representatives of whether or not it and/or the transferee '*envisages'* that they will take '*measures'* in relation to any affected employees and, if so, what those measures are. Neither '*measures'* nor '*envisages'* is defined in TUPE but there is some case law which assists and the most useful is **Institution of Professional Civil Servants and ors v Secretary of State for Defence** 1987 IRLR 373, ChD,

179. In that case Mr Justice Millett discussed the meaning of '*measures'* and '*envisages'* in the relevant provisions. In his opinion, '*measures'* is a word of the widest import and includes any action, step or arrangement. '*Envisages'* simply means '*visualises'* or '*foresees'*. He went on to state that the phrase '*measures which he envisages he will … take'* is apt to exclude mere hopes and possibilities.

180. It seems clear to the tribunal that all of the realignment of the pre-merger commissioning services, the placing of staff into new roles, changes to existing roles, any amalgamation or realignment of teams, indeed anything and arguably everything which was done in order to create effectively a shadow NN CCG prior to the formal merger and creation of that organisation on 1 April 2019 was a measure on the presumption that there was a relevant transfer.

181. This means that given there were pre-transfer measures, again on the presumption that there was to be a TUPE transfer, each of the pre-merger CCGs should have provided information under Regulation 13 to relevant employee representatives, and in the present case to the BMA, and should have consulted about their measures which in this case would have included consultation about the proposal to dismiss the employed Clinical Leads, including of course C1 from NC CCG.

182. The clear failure to do that means that had there been a relevant transfer this claim would have succeeded. As we have set out above Mr Wright told the BMA that there were to be no measures and that everything was to be done with what he called a light touch. In one sense he was right about that but in our view, in saying there would be no measures he could only have been referring to the position after 1 April 2019 because of course prior to that date all of the measures which were needed had been taken. It would be surprising to the tribunal if the HR advice to the six pre-merger CCGs was anything other than pre-transfer changes to in effect create a shadow transferee were likely to be measures if there were to be TUPE transfers from the CCGs to NN CCG.

183. On that basis the claim succeeds.

184. In summary therefore we conclude as follows:

a. there was no relevant transfer under TUPE on 1 April 2019 because the exception in Regulation 3(5) TUPE applied,

b. it follows that the claim for automatic unfair dismissal under Regulation 7(1), the claim for unfair dismissal under Regulation 7(2) and the claim for failure to inform and/or consult under Regulation 13 TUPE fail,

c. the claim for breach of contract fails because the tribunal lacks jurisdiction to hear the claim for the reasons set out above,

d. the claim for ordinary unfair dismissal succeeds but the liability for that claim does not transfer to the respondent as there was no transfer connected dismissal.

185. Had there been a relevant transfer we would have concluded as follows

a. the claim for automatic unfair dismissal would have succeeded, and the liability for that claim would have transferred to NN CCG and by the respondent's concession to the respondent,

b. the alternative claim for unfair dismissal if an ETO reason had been relied upon would have succeeded, and again the liability for that claim would transfer,

c. the claim for 'ordinary' unfair dismissal would have succeeded,

d. the claim for failure to inform and/or consult under TUPE would have succeeded, and

e. the claim for breach of contract would have failed.

_____

Employment Judge Brewer

Date: 29 July 2022

Appendix

JOINT AGREED LIST OF ISSUES

Dr Bicknell (C1) pursues the following complaints:

(i) Automatic unfair dismissal (Reg 7 TUPE)

(ii) Unfair Dismissal (Section 98 ERA)

(iii) Breach of Contract

Dr Bicknell is no longer pursuing his claim for age discrimination.

The BMA (C2) pursues a complaint of breach of failure to inform and consult against R (Reg 13 TUPE)

The Respondents have withdrawn their concession that a TUPE transfer took place.

TUPE TRANSFER

1. Was there a TUPE transfer within the meaning of reg 3(1) TUPE 2006? In particular, did NHS England's dissolution of R1 (and others), its establishment of R2, and its Transfer Schemes transferring the staff and property from one to the other, amount to an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities, within the meaning of reg 3(5) TUPE 2006?

CLAIMS BROUGHT BY DR BICKNELL

A) AUTOMATIC/ ORDINARY UNFAIR DISMISSAL

2. Was the transfer the sole or principal reason for Dr Bicknell's dismissal within the meaning of reg 7(1) TUPE?

3. Was the sole or principal reason for the dismissal an economic, technical or organizational reason entailing changes within the workforce within the meaning of regulations 7(2) and 7(3A) TUPE?

4. If so, was the reason redundancy or some other substantial reason?

5. In either case, was Dr Bicknell's dismissal fair pursuant to s98(4) ERA 1996?

6. If Dr Bicknell was unfairly dismissed, what, if any, Polkey deduction should be made?

7. If Dr Bicknell was unfairly dismissed, what compensatory award would be just and equitable in all the circumstances?

B) BREACH OF CONTRACT

8. Does the Tribunal have jurisdiction to hear his claim under Article 3(c) Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623, given the Respondents contend that the payment was not outstanding on the termination of employment nor arose on termination of employment, but instead was contingent or conditional?

9. Was Dr Bicknell underpaid his contractual NHS redundancy payment, having based his redundancy pay on a 40 hour full time working week instead of a 37 hour full time working week?

CLAIM BROUGHT BY THE BMA

10. In accordance with Reg 13(2) and 13(2A) TUPE did the employer, long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives (the BMA), inform the representatives of
    (a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;
    (b) the legal, economic and social implications of the transfer for any affected employees;
    (c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and
    (d) where, as here, the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

11. Did R1 and/or R2 having envisaged it would take measures in relation to Dr Bicknell or others, in connection with the relevant transfer, within the meaning of Reg 13(6) consult appropriate representatives of that employee (the BMA) with a view to seeking their agreement to the intended measures?

12. If so, in the course of those consultations did the employer (a) consider any representations made by the appropriate representatives (the BMA) and (b) reply to those representations, and if he rejected any of those representations, state his reasons, pursuant to Reg 13(6) and (7)?